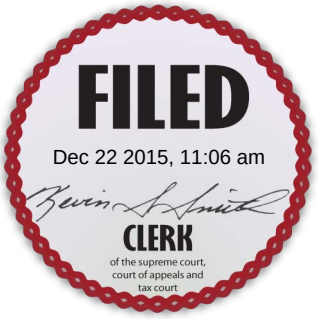

ATTORNEY FOR APPELLANT

Ronald K. Smith
Muncie, Indiana

ATTORNEYS FOR APPELLEE

Gregory F. Zoeller
Attorney General of Indiana

Ellen H. Meilaender
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Marcus Marcellus Tabb,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 22, 2015

Court of Appeals Case No. 18A05-1412-CR-603

Appeal from the Delaware Circuit Court.
The Honorable Thomas A. Cannon, Jr., Judge.
Cause No. 18C05-1306-FA-6

Shepard, Senior Judge

[1] Marcus Marcellus Tabb and his wife Charlene Tabb were convicted on multiple counts arising from their abuse of her three younger siblings and the death of her four-year-old cousin. Marcus Tabb challenges his convictions for neglect, and his sentence. We affirm. It will be difficult reading.

Issues

[2] Tabb presents the following issues for our review:

I. Whether there is sufficient evidence to support Tabb's convictions for neglect of a dependent;

II. Whether the trial court wrongly admitted expert testimony based in part on medical and psychological reports prepared by others;

III. Whether the court erred by admitting Tabb's statement to police;

IV. Whether the prosecutor committed misconduct during closing argument; and

V. Whether the court abused its discretion in sentencing.

Facts and Procedural History

[3] Tabb's wife Charlene and Charlene's parents, who lived in Florida, decided it would be better for Charlene's siblings and a young cousin to live with Tabb and Charlene in Muncie. In July 2012, the two drove to Florida and brought all four children back to Indiana, a place the children had never visited. J.G. was fifteen years old, R.G. was thirteen, Jr.G. was ten, and M.P. was four.

[4] After arriving in Indiana, Charlene's siblings lived alone in a house on North Brady Street, while Tabb, Charlene, and M.P. lived in a house on 6th Street. Tabb installed cameras throughout the Brady Street house so that he and Charlene could monitor and record the children's behavior. They gave the children strict rules, and the consequences for any perceived misbehavior were extreme. They were not allowed to speak to each other or have telephone conversations with their parents without Charlene or Tabb being present, which

was roughly once every three days when they brought food to the house. Otherwise, the children's contact with Tabb and Charlene consisted of stern lectures and whippings, many of which were videotaped, when the children broke a house rule—like leaving a little food spatter in the microwave, tracking in a small amount of dirt on the tile floor, and leaving a hair in the sink. In addition to corporal punishment, which Charlene dispensed, the consequences included kneeling on the hard floor for hours, eating only ramen noodles for meals, or writing out the violated rule 500 times.

[5] Tabb implemented this harsh regime because he believed that the children suffered from mental health and behavioral issues, and he thought the regime would improve their grades and behavior. He told the children that since he was their father now, they were required to obey him. Tabb signed various school forms for the older children as their parent or guardian and indicated that they lived with him. On one occasion, Tabb took R.G. to the hospital and signed the medical forms, as his guardian.

[6] In late November 2012, R.G. told a school counselor that the three older children were living by themselves and that their behavior was being monitored by cameras. After the counselor notified D.C.S., an investigator arranged to meet with the entire family at Brady Street. Beforehand, Tabb instructed the older children to say that Charlene and Tabb lived with them at Brady Street and not to mention M.P. Although the record is unclear whether Charlene was present, the investigator met with the three older children and Tabb, who did most of the talking. Since M.P. was kept at the house on 6th Street, the

investigator was unaware of her existence. R.G. was later punished for having spoken to the school counselor. M.P. and Charlene moved to Brady Street, while Tabb visited and continued to monitor things by camera.

[7] M.P. had no apparent health problems when she lived in Florida, but that changed. Her health devolved to the point that she was vomiting daily. Neither Charlene nor Tabb took M.P. for medical treatment. They perceived her behavior to be intentional tantrums rather than health issues, and punished her. The older children were not allowed to speak to M.P. and she was forbidden from talking to them. If Charlene was not present, the older children were instructed to punish M.P. for vomiting, the Charlene way—corporal punishment.

[8] Eventually, Charlene urged the older children to be more creative with punishing M.P. She and the older children escalated from whippings with belts or cords, to the use of a hammer, pliers, and a screwdriver. Even though M.P.'s health was getting worse by the day, and R.G. had urged Charlene to take M.P. to the hospital for treatment of a serious wound he had inflicted, neither Charlene nor Tabb did so. M.P. was weak, had trouble standing, complained that she was dizzy and did not feel well. By contrast, on June 21, 2013, Tabb took J.G., R.G., and Jr.G. to the doctor because they had strep throat and he purchased medicine for them.

[9] At about 6 p.m. the next day, Tabb took medicine to the children and left. Later that evening, R.G. heard M.P. making choking or gagging sounds. When

he got up to investigate, M.P. remained still when he kicked her with his foot. Panicked, he awakened his sister J.G., screaming that M.P. was dead, and then called Tabb. After he told Tabb that M.P. was not breathing, Tabb yelled at R.G., saying the responsibility for M.P.'s condition was R.G.'s, since he was the man of the house. Tabb drove to Charlene's workplace, picked her up, and drove to Brady Street. They *then* called 911.

[10] Medics and responding officers found M.P. lying on the floor, already dead. Rigor mortis had set in. There were extensive visible injuries. Tests later revealed at least eighty separate injury marks on her body, in various stages of healing, the majority of which were over twenty-four hours old. The swelling of M.P.'s body was caused by vascular dehydration which would have taken days or weeks to progress to that point. M.P.'s cause of death was pulmonary embolus related to her dehydration and injuries, including lack of movement and infection.

[11] The State charged Tabb with Class A felony neglect of a dependent,[1] later adding three counts of Class D felony neglect,[2] and six counts of Class C felony aiding battery.[3] A jury found Tabb guilty of Class A felony neglect of a dependent, three counts of Class D felony neglect, and three counts of Class C

---

[1] Ind. Code § 35-46-1-4(b)(3) (2012).

[2] Ind. Code § 35-46-1-4(a)(1), (2) (2012).

[3] Ind. Code § 35-41-2-4 (1977) (aiding); Ind. Code § 35-42-2-1(a)(2)(B) (2012) (battery).

felony aiding battery.[4] The court sentenced Tabb to an aggregate of fifty-six years.

Discussion and Decision

I. Sufficiency of the Evidence

[12] When reviewing the evidence to support a criminal conviction, we neither reweigh the evidence nor reassess witness credibility. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). We consider only the evidence supporting the judgment and any reasonable inferences that could be drawn from such evidence. *Id.* We affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

[13] To support Tabb's conviction for neglect as a Class A felony, the State was required to establish that Tabb, who was at least eighteen years old and had voluntarily assumed the care of M.P., who was less than fourteen years old, knowingly or intentionally placed her in a situation that endangered her life or health and that the neglect resulted in her death. Ind. Code § 35-46-1-4(b)(3). For the three counts of neglect as a Class D felony, the State was required to establish that Tabb, who had voluntarily assumed the care of J.G., R.G., and Jr.G., knowingly or intentionally placed them in a situation that endangered

---

[4] The jury found Tabb not guilty of two counts of aiding battery, and returned a guilty verdict on one count of Class A misdemeanor aiding battery as a lesser-included offense. The trial court entered a judgment of acquittal notwithstanding the verdict on the conviction for the lesser-included offense.

their life or health, or abandoned them. Ind. Code § 35-46-1-4(a)(1), (2). As defined in that chapter, a dependent means an unemancipated person who is under eighteen years of age. Ind. Code § 35-46-1-1 (2007). Support is defined as food, clothing, shelter, or medical care. *Id.*

[14] Tabb's main contention is that he did not knowingly place the children in a situation that could endanger their life or health or abandon them, or that would result in M.P.'s death. He also argues that because he himself did not dispense corporal punishment, he did not commit the offenses.

[15] Neglect, however, "is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind . . . ." *Eaglen v. State*, 249 Ind. 144, 150, 231 N.E.2d 147, 150 (1967). And, for purposes of the neglect statute, health includes "an individual's psychological, mental and emotional status." *Harrison v. State*, 644 N.E.2d 888, 890 (Ind. Ct. App. 1994), *trans. denied.*

[16] With respect to the knowledge required to support a neglect conviction, the question is whether the defendant was subjectively aware of a high probability that he or she placed the dependents in a situation involving an actual and appreciable danger to them. *Id.* at 891. Such a danger arises when dependent children are exposed to some risk of physical or mental harm that goes significantly beyond "the normal risk of bumps, bruises, or even worse that accompany the activities of the average child." *Gross v. State*, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004).

[17] The evidence overwhelmingly supports the convictions. Tabb and Charlene drove to Florida where they voluntarily assumed the care of the four children and supervised them in Muncie. Tabb participated in the meeting at which the family rules were discussed with the children. Tabb was the one who installed cameras to monitor their behavior on Brady Street. They brought food every three days or so and would cook a meal. Tabb was the person the children were to call in case of an emergency.

[18] When the children violated a rule, Tabb would inform Charlene, and she would go to the house to lecture and whip the children with cords or belts. Tabb recorded many of those beatings. The children would scream and cry in pain, flinching and trying to protect themselves from the blows that struck different parts of their bodies. The whippings resulted in swelling, bleeding, or other injuries. In the recordings, Charlene could be heard asking Tabb if she had forgotten anything. He would respond by correcting her, agreeing with her, or keeping count of the lashes she dispensed when she lost track.

[19] Though Tabb was aware of the discipline Charlene used, he did not intervene when M.P. and Charlene moved into the Brady Street home. Initially, when M.P. began to occasionally vomit, Charlene gave her some over-the-counter medicine. When M.P. began to vomit on a daily basis, Tabb and Charlene became convinced that M.P. was just throwing a tantrum. They could be heard discussing this on one of the videotaped recordings. When the weather was warm, M.P. was required to eat her food outside so she would not make the house messy. At one point, when M.P. threw up, Tabb gave her something else

to eat. Charlene objected, claiming that M.P. was wasting money. After that, Charlene forced M.P. to eat her own vomit, a punishment of which Tabb was aware.

[20] On one occasion, Charlene instructed her three siblings to hit M.P. on the feet and toes with a hammer as Charlene watched, telling the children that they were giving M.P. what M.P. wanted. On other occasions they struck her on the buttocks with the hammer. Eventually, the children then began to use pliers on M.P.'s fingers, toes, and nipples. They used a screwdriver to stab M.P. in the buttocks and on her feet. Shockingly, the record contains even more, but this recitation is already too much.

[21] Tabb was aware of the vicious nature of the corporal punishment inflicted on each of the children. Instead of taking measures to alleviate those conditions, he reported rule violations to Charlene, and videotaped some of the beatings that ensued.

[22] Besides the death of M.P., the beatings and other corporal punishment on the surviving children have produced long-lasting damage. J.G. has been diagnosed with post-traumatic stress disorder. R.G. has post-traumatic stress disorder and conduct disorder. Jr.G. has post-traumatic stress disorder, conduct disorder, and anti-social personality disorder. M.P.'s physical injuries were profound, readily observable, and well beyond the bumps, bruises, or even worse that accompany the activities of the average child. Not only did Tabb fail to intervene in the discipline, he failed to seek medical care for M.P. as she

suffered early on from digestive issues. It would be difficult to find a case where the jury's verdicts were more thoroughly supported by the evidence.

II. Admissibility of Expert Testimony

[23] Tabb claims that the trial court wrongly admitted the videotaped deposition of Dr. Frank Krause. He says the testimony violated Indiana Evidence Rule 703[5] because an insufficient foundation was laid that an expert, such as Krause, would rely on information provided by third parties in arriving at an opinion.

[24] A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion. *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014).

[25] Krause's videotaped deposition was played for the jury in lieu of live testimony. Krause explained that in addition to meeting with the three siblings, walking through the home on Brady Street, reviewing photographs of M.P.'s injuries, viewing the video-recordings of the beatings and lectures of the three older children, reviewing their statements to police and taped depositions, and reviewing Tabb's statement to police, he reviewed the psychological evaluations pertaining to J.G., R.G., and Jr.G., prepared by the Youth Opportunity Center and the mental health diagnoses contained in those reports. It is Krause's

---

[5] At trial, Tabb objected to Krause's testimony under Evidence Rule 702(b), alleging that there was no scientific reliability for his conclusions and that he used flawed methodology, and under Evidence Rule 802, arguing that testimony about the evaluations performed by the Youth Opportunity Center, a treatment facility for children, constituted hearsay. Tabb did not raise an objection under Evidence Rule 703 at trial.

testimony about the latter that Tabb contends lacked a sufficient foundation under Evidence Rule 703.

[26] Evidence Rule 703 explicitly provides that experts "may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Evidence reasonably relied upon by psychiatrists and mental health experts can include mental hospital records, reports by clinical psychologists and social workers, and police reports relied upon by psychiatrists or psychologists. *See* Robert Lowell Miller, Jr., Indiana Practice, Indiana Evidence § 703.107 (3rd ed. 2007) (discussing types of reports prepared by others reasonably relied on under Evidence Rule 703).

[27] Krause testified that it is common in his field to rely on evaluations and reports from facilities such as the Youth Opportunity Center. The testing done there was performed by psychologists and interns and involved psychological, intelligence, and personality tests in addition to a thorough family and psycho-social history. A psychiatrist may reasonably rely upon an examination performed by another psychiatrist in reaching his own opinion. *Brown v. State*, 271 Ind. 129, 132-33, 390 N.E.2d 1000, 1003-04 (1979).

[28] Rule 703 allows the expert to offer an opinion, the credibility of which can be evaluated by the jury when considering the evidence informing that opinion. Tabb was free to challenge the adequacy of the reports upon which Krause based his opinion through cross-examination. We find no abuse of discretion.

III. Admissibility of Tabb's Statement to Police

[29] Tabb does not challenge the admission of the first portion of his statement to police, but claims that there were two specific instances during that visit when continued questioning by police rendered his statement involuntary in violation of his *Miranda* rights. A confession is voluntary if in light of the totality of the circumstances it is the product of "a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will." *Scalissi v. State*, 759 N.E.2d 618, 621 (Ind. 2001). "The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence." *Page v. State*, 689 N.E.2d 707, 711 (Ind. 1997).

[30] Tabb voluntarily went to the police station and spoke with Detective Richard Howell. After a break in the questioning, Howell and Detective James Gibson returned. When Gibson attempted to read Tabb his *Miranda* rights and explain the written waiver of rights, Tabb stated that he "should probably have an attorney present before I answer any more questions." State's Exhibit 142A p. 23.[6] Although Tabb did not sign the waiver, he indicated to the officers that he understood his rights and proceeded to answer questions.

---

[6] The videotaped recording of Tabb's statement to police was admitted in evidence without objection as State's Exhibit 142. State's Exhibit 142A is a transcription of Tabb's statements to Detective Howell and Detective Gibson, which was offered, but not admitted at trial. An exhibit referred to in the record as State's Exhibit 142B is a DVD audio and video recording of Tabb's statement and was published to the jury. For ease of reference, we are citing to the transcript of Tabb's statement.

[31] Tabb's statement, recorded on a DVD, was admitted in evidence during Howell's testimony at trial with "no objection" from Tabb. Tr. p. 564. When the State later sought to publish the statement to the jury, Tabb objected, saying the statements made after the short break should be excluded. He argued that the encounter then became a custodial interrogation, Tabb should have been allowed to consult with an attorney, and cited two specific exchanges in support of the argument. The trial court overruled Tabb's objections and the DVD was played for the jury.

[32] Tabb's comment that he should probably have an attorney present before answering any more questions could not be reasonably construed as an unequivocal request for the assistance of an attorney. *See Collins v. State*, 873 N.E.2d 149, 155-56 (Ind. Ct. App. 2007) (statement defendant "probably" needs an attorney not an unequivocal request requiring police to cease questioning), *trans. denied*. Tabb proceeded to answer questions without hesitation after making that statement and there is no evidence of police misconduct. The court did not abuse its discretion by overruling Tabb's objection.

[33] Next, during Tabb's statement, the officers asked him questions about the cameras on Brady Street and the photographs sent to his email account. When they asked to look at his computer, Tabb replied, "I'd have to have an attorney if you want to look at my computer." State's Ex. 142A p. 40. After clarifying Tabb's response to the question, one of the officers said, "Okay." *Id.* at 41. Tabb then continued to speak with the officers, clarifying that he would need to

have the advice of counsel if the officers sought to look at his computer or the emails. The equivocal nature of those statements by Tabb limiting the scope of topics he was willing to address without counsel stand in stark contrast to his later statement, "And right now—I, I want to end this questioning—you know? I'm not going to answer anymore [sic] questions. . . . I'm done with the questions." State's Ex. 142A p. 48-50. At that point, Tabb was detained by the officers and questioning ceased. The trial court did not err in admitting Tabb's statement to police.

IV. Prosecutorial Misconduct During Closing Argument

[34] To preserve a claim of prosecutorial misconduct for appellate review, at the time the misconduct occurs, the defendant must request an admonishment, and if further relief is sought, move for a mistrial. *Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014). We must determine first whether misconduct occurred, and if so, whether the misconduct under all of the circumstances placed the defendant in a position of grave peril to which he would not have been subjected. *Id.* When examining the gravity of peril, we measure the probable persuasive effect of the misconduct on the jury's decision rather than on the degree of impropriety of the conduct. *Id.*

[35] Tabb's counsel moved for an admonishment and a mistrial, of which both were denied. A trial court's rulings on requests for admonishments and mistrials are reviewed for an abuse of discretion. *See e.g., Brock v. State*, 955 N.E.2d 195 (Ind.

2011) (mistrial reviewed for abuse of discretion); *Jackson v. State*, 925 N.E.2d 369 (Ind. 2010) (admonishment reviewed for abuse of discretion).

[36] Throughout the trial, the defense theory was that Tabb was unaware of M.P.'s deteriorating health or that she was being abused or neglected. During closing argument, the prosecutor attempted to make the following analogy in response to Tabb's defense of lack of knowledge.

> . . . I've been trying to come up with a comparison and an analogy of this case in terms of the Defendant knew things . . . he didn't know everything but you know he may not have known that she was hit with a hammer, okay, but he knew some things and so I was trying to come up with that and for the Defendant to say that he didn't know [M.P.] was being abused is almost the equivalent of trying to say that a . . . one of the male prison guards at Auschwitz Concentration Camp did . . .

Tr. p. 1261. Tabb's counsel objected and a sidebar conference was held off the record. The State then proceeded with its argument, briefly continuing with that theme. After the State's closing, Tabb's counsel again sought a mistrial and an admonishment, claiming that the State's comments incited the passions of the jury. Both requests were denied.

[37] In his discussion of the difference between opening statements and closing arguments, Steven Lubet observes the cardinal rule that argument is not allowed in opening statements. Steven Lubet, *Modern Trial Advocacy Analysis & Practice* 423 (2013). On the other hand, the hallmark of closing arguments is that the argument must be made in an effort to win the case. *Id.* The use of analogies, allusions, and stories are means by which such a successful argument

can be made. *Id.* at 419. The use of an analogy to explain human conduct through a comparison to some widely understood experience or activity can make for an effective argument. *Id.* at 426.

[38] The comments Tabb takes issue with are indeed strong and ran the risk of offending or inciting the jury. The trial court examined the State's closing argument as a whole and determined that the analogy constituted a brief reference to a historical occurrence. The court acknowledged the leeway given to counsel in closing argument and that the jury had been instructed that arguments are not evidence. We find no abuse of discretion here.

V. Sentencing Error

[39] Tabb challenges his fifty-six year sentence. Although he cites the standard of review under Indiana Appellate Rule 7(B), the basis of his argument is that two of the aggravating factors found by the trial court are erroneous. We thus analyze Tabb's sentence for an abuse of discretion as respects the findings. Our Supreme Court has made clear that a trial court may abuse its discretion by finding aggravating or mitigating factors that are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

[40] Tabb claims that the court erred by finding that because the harm, injury, and damage suffered by M.P. was significant and greater than necessary to prove the offense, an enhanced sentence was justified. In support of that argument he

claims that the undisputed testimony at trial established that M.P.'s injuries were inflicted not by Tabb but by others.

[41] The Indiana Code explicitly allows a trial court to consider that very aggravating circumstance. Ind. Code § 35-38-1-7.1(a) (2012). Furthermore, the nature and circumstances of a crime is a proper aggravating circumstance. *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001). Tabb was aware of Charlene's corporal punishment of the children and instead of intervening, he chose to videotape and monitor some of those whippings. There were over eighty wounds to M.P.'s body, which should have been noticeable to anyone observing her. Last, Tabb did not have to inflict the injuries to be guilty of Class A felony neglect. It was sufficient that he knowingly placed M.P. in a dangerous situation and failed to remove her from that situation. *See Wilson v. State*, 525 N.E.2d 619, 625 (Ind. Ct. App. 1988) (conviction upheld where mother knew boyfriend used forceful discipline resulting in bruises on child but did not remove child from situation).

[42] Tabb also argues that the trial court erred by finding that Tabb lacked remorse. Tabb claims that this impermissibly penalizes him for maintaining his innocence and exercising his right to a trial. Our Supreme Court has held that maintaining one's innocence in the face of obvious guilt can be an aggravator, as it is in federal courts. *Hackett v. State*, 716 N.E.2d 1273, 1277 (Ind. 1999).

[43] The probation officer reported that Tabb expressed remorse for what happened to M.P. but believed he had committed no crime. Tabb felt that he was being

blamed for someone else's mistakes and that it was acceptable to tell lies to protect family members. The evidence that Tabb was aware of the abuse of M.P. yet failed to report it or remove her from the situation was extensive. The court did not err by finding this aggravating circumstance.

[44] The sentence is not defective for reason of being supported by erroneous aggravators.

Conclusion

[45] In light of the foregoing, we affirm Tabb's convictions and sentence.

[46] Affirmed.

Baker, J., and Bailey, J., concur.